No. 297. 58

Brief of Clark for Respondent.

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Filed Oct. 10, 1899.

In the Supreme Court of the United States

Application for Writ of Certiorari to the Circuit Court of Appeals for the Fifth Circuit.

LOUIS BERNHEIMER, INTERVENOR, APPELLANT,

vs.

L. J. BRYAN, MARSHAL, FOR USE OF, ETC., APPELLEE.

Brief of Thos. H. Clark

For Louis Bernheimer, Against Application.

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LOUIS BERNHEIMER, INTERVENOR, APPELLANT,

vs.

L. J. BRYAN, MARSHAL, FOR USE OF, ETC., APPELLEE.

Brief of ~~E. W. CHILTON~~ Thos. H. Clark,

For Louis Bernheimer.

The facts of this case are as follows: On the 29th day of October, 1898, one D. Abraham, made a general assignment for the benefit of all his creditors to H. C. Davidson, and this assignment was, on the day of its execution, filed for record in the office of the Probate Judge of Montgomery County. On the 7th day of November, 1898, certain creditors of Abraham filed their petition in the District Court of the United States for the Middle District of Alabama; setting up the making of said assignment by Abraham, and praying that he be declared a bankrupt. On the 12th day of December,

1898, Abraham was adjudged an involuntary bankrupt, on this petition. (Pages 1, 2, 3 and 4 of printed transcript.) But nearly thirty days before the adjudication in bankruptcy, Davidson, the assignee, under the duty imposed and the authority vested in him by the deed of assignment, on the 17th day of November, 1898, proceeded to advertise the sale of the property assigned by the assignment, viz: the stock of goods and store fixtures which are the subject-matter of this litigation, that after Davidson had given notice and was about to proceed to sell the property assigned, the petitioning creditors filed another petition in said court, asking that Davidson be ordered to appear before the court and show cause why he should not be restrained from selling the assigned property; that in obedience to the rule *nisi* issued on the last petition, Davidson did appear before the court "and showing cause satisfactory to the court, said rule was discharged and said court declined to make the order prayed for restraining him from selling said goods." (See Bernheimer's Intervention, p. 15 of Printed Record.) Immediately after the discharge of the rule *nisi* and the order of the court refusing to restrain Davidson as assignee from making the sale, said Davidson, as assignee, proceeded to sell said goods at public auction, for cash, in the city of Montgomery; that at this sale appellant, Bernheimer, bought said goods for the sum of three thousand, five hundred dollars cash, paying the money and going at once into the possession of the goods, and remaining in possession until dispossessed thereof by the Marshal, the appellee. (Bernheimer's Intervention, p. 15 of Printed Record.)

On the 12th day of December, 1898, the petitioning creditors of Abraham filed another petition, asking the court to order the marshal to take possession, among other things, of all the stock of goods sold by Davidson

to Bernheimer. This petition avers that "said Davidson, disregarding the authority and jurisdiction of the court, proceeded to sell and dispose of said property." It will be noted that of course this petition was filed AFTER the court had refused, at the instance of these very creditors, to restrain Davidson, and that with full knowledge of all the facts they had permitted Davidson to sell. (See p. 5 of Printed Transcript.) Allegations were made in this petition that the goods were sold at a sum greatly less than their value, and nowhere under the issues joined in Bernheimer's intervention is any such fact disclosed, if it did exist. Bernheimer's sworn intervention shows that the price paid by him "was a fair, just and reasonable price" for said goods. On this averment the appellee has refused to take issue, and the court below, in sustaining his demurrers, refused to compel him to take issue. (Bernheimer's Intervention, p. 15, of Printed Transcript.)

It will be noted that all of the proceedings brought to abrogate appellant's title to the goods in question, were, up to and including the filing of the last named petition, wholly *ex parte*, and no proofs seem to have been made or required of the averments of the petition. But, on the last petition, the court did, on the 13th day of December, 1898, issue, apparently *ex mero motu*, an order, commanding Bernheimer to appear within ten days from said date, and "propound any claim he has to the goods so seized, or any part thereof, or, failing therein, he will be deemed to have no claim or right thereto." Supplementary to the effort to deprive Bernheimer of the goods, the petition of the creditors of date of filing, December 17, 1898, was made, asking that Bernheimer be made to account before the Referee in Bankruptcy for the proceeds of the sales which had been made by him of any of the goods so bought from Davidson. No

order by the court on this latter petition appears to have been made, so far as this transcript is concerned, but, as is apparent from the answer of Bernheimer filed "as a part of the proceedings on his propounded claim," such order did issue. Some apparent interruption in the continuity of the Record is caused by the fact that the said rule to Bernheimer, ordering him to show cause, was issued before the filing of the petition asking that he be compelled to account, etc., but both the propounding of his claim and his answer to the order to account were parts of the same proceeding. They were treated as such, for, it will be observed the demurrers of appellee were filed to both claims, or, rather, they were filed to the claim filed December 22d, and re-filed to answer filed December 24th, and the judgment entry on page 17 of Record includes them both by name. The demurrers to Bernheimer's claim propounded under the order of the Bankrupt Court are found on pages 13 and 14 of the printed transcript. It should be added to the statement of the facts in this case, that the Record discloses, by the sworn petition of the creditors for whose use appellee, as marshal, is holding these goods, that Davidson, as assignee, and before the sale by him to Bernheimer, complied with the laws of the State of Alabama in reference to assignments. (See petition of creditors, page 4, of printed transcript.) In the words of this petition "That upon the delivery of the deed of assignment to him the said H. C. Davidson entered upon the execution of said trust; that afterwards, as required by the laws of the State of Alabama, the said Davidson filed an inventory of all of the property coming into his possession as assignee, in the office of the Register in Chancery of Montgomery."

These demurrers, and the whole Record, raise only three questions:

1st. Did the District Court have jurisdiction to try the title to these goods by seizing the property without notice to Bernheimer, and then compelling him to come in, by a rule, to propound his claim or show cause?

2d. Did Bernheimer, under the peculiar circumstances of this case, acquire a title to the goods sold to him by Davidson paramount to the claims of D. Abraham's creditors?

3d. Does the fact that these goods were so sold to Bernheimer under the direct or implied sanction of the District Court, in refusing to restrain Davidson from selling, in a proceeding brought by the creditors for whose use the appellee is acting, and of which they had full notice, which sale they did not endeavor to prevent in the only manner by which, under the Bankrupt law, they might have prevented the same, estop them, and the court so acting, and its officer, the appellee, from assailing the validity of such sale as they have assailed it?

This case presents some remarkable features. We have this peculiarly anomalous state of affairs. The proceeds of the sale made by Davidson, as assignee, are being administered in a State Court—the City Court of Montgomery, sitting in Equity, for the benefit of all the creditors of Abraham, including the petitioning creditors in Bankruptcy, and the goods so sold, have been seized and taken into the custody of the United States Court, in the Bankruptcy proceeding against Abraham. Who are the *cestuis que trust* in the City Court? The creditors of Abraham, of course. Who are the beneficiaries of the estate in the United States Court? Of course these same creditors. The proceeds of the sale to appellant certainly can not, in any event, belong to the Bankrupt. His creditors are entitled to all his property for the liquidation of his debts. The money can

not belong to Davidson, for he only holds as trustee for the benefit of the creditors. It would be a flagrant absurdity to say that Bernheimer owns the money still; and Davidson could not pay it back to him, without being guilty of a breach of trust, and Abraham's creditors could hold both liable for the full amount, should this be done. Here the court's attention is called to the statement made by Bernheimer in his claim filed on the — day of December, 1898, in response to the urgent invitation of the District Court, which has been re-enforced by the sequestration of the property he had bought—a sequestration that preceded the invitation, by the way. Bernheimer, in this claim "asks the court's protection in the premises." (~~He was in grievous need of it.~~)

He asks that the court will issue such rules and orders in the premises as may be necessary for his protection. He further asks that the creditors of the Bankrupt estate be remitted to the fund derived by Davidson from the purchase of the goods." He asks that "in default of such order, or if he is mistaken in the relief prayed for" that the court issue a rule commanding Davidson to pay into the court the full amount derived by him from the appellant, as purchase money of the goods; that the same be paid over to him, and, should this be done, he offers to rescind the purchase and waive all claims to the goods. But no. In spite of all these facts being made apparent to the court, it is inexorably adjudged that he has no claim to the goods and no relief whatever. Not only must the goods, but the money he has paid for them, be devoted to the satisfaction of the debts due by Abraham. Can it be doubted that Davidson, holding moneys belonging to the Bankrupt estate, was under the control of the District Court? These very creditors asked for an order against him to turn over to

the Marshal of the court "the books, accounts, papers, choses in action and any other property or effects, which may be in his possession." See petition of creditors, p. 5 of printed transcript. The District Court, on this petition, ordered Davidson to do so. It is a necessary consequence of this condition of affairs that the proceeds of this purchase by Bernheimer was, in legal effect, in the custody of the District Court,—it was most assuredly under its control, at the very time that Bernheimer implored in vain its protection. Indeed, nothing in this record discloses that the Marshal has not already got this money. It is the presumption of law that he has obeyed the mandates of the court In substance and law these creditors and the court which was guarding their interests with such earnest care that, it seems to us, the just rights of appellant were wholly ignored, were and are in the position of one who seeks to abrogate a sale or rescind a contract without any proposition or effort to put the other party in *statu quo*. If these creditors were of those who were beneficiaries under the assignment to Davidson, and that they are so can not be denied. If the District Court had that control, over Davidson and all assets in his hands, belonging to the Bankrupt estate, including the proceeds of the sale to appellant, which it undoubtedly had, and indeed exercised at the instance of these very creditors, as indicated in the order and petition last mentioned; then the creditors, and the court and its officers for them, had actual control and custody, in legal effect, both of the goods Bernheimer had bought and the money he had paid for them. Is there anything in this record which exempts them from the just rule that one can not "eat his cake and keep it too?" It is the universal rule of law and equity that a vendor, or a vendee seeking to rescind and annul a contract of sale, or

any other agreement, must "put the opposite party in *statu quo* before he can exercise the right."

Walker v. L. & N. R. R. Co., 111 Ala. 233.

This is so, even where the party against whom the recission is sought has been guilty of fraud. It may be urged that Davidson was not a party to this proceeding, and that the fund he had was not *in custodia legis*. For that matter, neither was Bernheimer a party and neither were the goods he had, in *custodia legis*, until the property he had bought was taken from him, in an *ex parte* proceeding, and without any due process of law, and he was commanded, after being stripped of his goods, to come in and say if he had any right in them. But there is no doubt that Davidson was under the power of the court. Admittedly, he had assets which by the express terms of his title thereto, viz: the deed of assignment, belonged to the creditors of Abraham's bankrupt estate His did not, and does not, in deed or word, pretend that he holds now adversely to these creditors. Why did not these creditors, represented by appellee join in the reasonable request of Bernheimer, that the court would order this assignee who held this property—this money paid by Bernheimer *for them*, to pay it into court, so that the court might order it repaid to Bernheimer, and, by thus putting him *in statu quo* give some appearance of justice to the recission of Davidson's sale to him? The answer must be found in something *dehors* this record. As it stands the only reasonable solution they can give for their conduct is to say with open, though somewhat brutal frankness that they purpose getting Bernheimer's goods and the money he paid for them also. This will unquestionably be the result if the District Court judgment is allowed to stand.

Appellant insists that the District Court was without ju-

risdiction to try and determine his title to these goods, by a sequestration and and rule on him to show cause. At the time they were seized, without due process of law, and at the time he was compelled, without due process of law to come in and claim them under this rule to show cause, he was claiming them adversely and against the world. He claimed them by a purchase from another person, Davidson, a man whose title in its inception was unquestionably legal.—Section 4167 *et seq.* of the Code of Alabama, 1896. Before Bernheimer's holding and title or Davidson's holding and title could be swept away, they had the right to demand due process of law to ascertain in a suit against them; not by *ex parte* proceedings in a suit to which they were not parties, not by a mere rule to show cause, but by the ordinary process of the law, that they had no title. It is a delightfully easy thing to say—you have no title to these things; the law says your supposed title is a nullity and this rigmarole about suing you and having a judicial determination of the law and facts is wholly useless and merely the suggestion of an annoying delay. For why? Because the good old rule sufficed *them*—the simple plan that "he may take who has the power, and he may keep who can."

But the United States has a Constitution, to which something more than perfunctory respect is paid. In that Constitution is a clause which provides that no one shall be deprived of his property without due process of law. What is "due process of law," has been the subject of much talk and more writing. We conceive it to mean the ordinary methods and proceedings provided by law for the ascertainment and adjudication of conflicting claims of litigants in courts of justice. But abstractions are unnecessary in this case. The Supreme Court of the United States has said what is and what is not "due process of law" under circumstances and in cases on "all fours" with

the case at bar. We will cite and comment on a few of them.

Smith v. Mason, 14 Wall. 419;
Marshall v. Knox, 16 Wall. 551;
Massie v. Allen, 17 Wall. 351.

It must also be borne in mind that there was no allegation in the petition that Bernheimer was insolvent or could not respond to any damages for any conversion by him. It follows,then, that unless this allegation could be made, the contrary is true, construing the proposition most strongly against the pleader. If it be argued that the bankruptcy court would be powerless to prevent dispossessions of this character without resorting to some of the rules, we reply that there certainly is no inherent power, in view of the constitutional and other inhibitions of the District Court to exercise this character of rule to deprive a person of property, and more especially when the proceeding is strictly statutory under the Bankruptcy Act of 1898, and this act provides for just such a contingency as that in this case. It will be seen from the pleadings that when Davidson, the assignee under the State law, was cited to appear before the District Judge to show cause why he should not be prohibited from disposing of the goods, the District Judge annulled this order and let Davidson go hence; and in so doing, he was controlled by the Bankruptcy law, sub-division E. of Section 3 of Chapter 3, where it provides the only remedy for taking charge of the goods of a bankrupt without notice, which remedy consists of the filing of a bond by the petitioning creditors with the court, or the Judge thereof, in such sum as the court may direct, conditioned for the payment, in case such petition is dismissed, of all costs, expenses and damages occasioned by such seizure, taking, detention, etc. In view of this statute, the vacating of the previous order was proper, and if it was

proper then, it was certainly error to issue another order, without any notice, the making of a bond or anything required by the statute.

Sub-division E. of Section 67, Chapter 7 of the Bankruptcy Act, provides that after the adjudication in bankruptcy and the property passing to the trustee, it shall be his duty to recover the same by legal proceedings or otherwise, for the benefit of the creditors. These remedies must be strictly followed, and they are exclusive. It would have been easy and very simple for the bond to have been given and the notice issued before the adjudication. Under the adjudication, for the trustee by legal means, or equitable means —if necessary, by due processes of law to have taken charge of this property, this would have given the appellant a day in court, and it certainly never was the intention of Congress to leave with courts of bankruptcy any summary methods, when two plain and adequate methods are described in the Act itself. It follows from what we have said above that the court acquired no jurisdiction to try this case. See—

Smith v. Mason, 14 Wall. 419.
Marshal v. Knox, 16 Wall. 551.
Massey v. Allen, 17 Wall. 351.

In Smith v. Mason, Mr. Justice Clifford, in delivering the opinion of the court, says, among other things: "Strangers to the proceedings in bankruptcy not served with process, and who have not voluntarily appeared and become parties to such a litigation, can not be compelled to come into court under a petition for a rule to show cause, as in this case, nor is the exercise of such a jurisdiction necessary, as the third clause of the second section of the Bankrupt Act affords the assignee a convenient, constitu-

tional and sufficient remedy to contest every adverse claim made by any person to any property or rights of property transferable to or vested in such assignee.'' It may be contended that the present act gives the courts a little fuller jurisdiction, but, as cited above, it specifies the mode and manner for the assignee to recover property and for the petitioning creditors to stop the sale of property, and in the case at bar the mode and manner so specified was in no sense attempted or resorted to.

In Marshal v. Knox, cited *supra*, Mr. Justice Bradley, in delivering the opinion of the court, says, among other things: ''The case here then depends on the question whether the district court had jurisdiction to proceed by rule, as it did. The goods, it has been seen were in the custody of the sheriff under a writ of provisional seizure, and held as a pledge for the rent of the lessor. The seizure had been made before the bankruptcy. The landlord claimed the right to thus hold possession of them until his claim for rent was satisfied. This claim was adverse to that of the assignee. The case presented was one of conflicting claims to the possession of goods; and the sheriff had present possession for the benefit of the lessor. Neither the sheriff nor the lessor was a party to the proceedings in bankruptcy. No process had been served upon them to make them such. They were not before the court and the court had no control or jurisdiction over them. Under these circumstances, the assignee applied for and obtained from the district court a rule on the lessor and sheriff to deliver the goods to them. Had the court authority to make such a rule? Could such a rule be characterized as due process of law? We think that it could not have been the intention of Congress thus to deprive parties claiming property, of which they were in possession, of the usual process of law in defense of

their rights." Mr. Justice Bradley cites the case of Smith v. Mason, (*supra*), and re-affirms it, saying: "It is the opinion of the court, therefore, that the case is not substantially different from that of Smith v. Mason, besides, it has another point in common with that case upon which a direct adjudication was made therein. The lessor in this case was not a party to the bankrupt proceeding, and in Smith v. Mason we held expressly that 'strangers to the proceedings in bankruptcy, not served with process and who have not voluntarily appeared and become parties to such litigation cannot be compelled to come into court under a petition for a rule to show cause.' The court is of the opinion, therefore, that the district court proceeded without jurisdiction in compelling the lessor and the sheriff, under a rule to show cause, to deliver up the possession of the goods in question to the assignees."

In the case of Massey v. Allen, cited *supra*, the assignee in bankruptcy did not resort, nor did the court, by summary methods, attempt to take possession of the goods, and Mr. Justice Field, in delivering the opinion of the court, in that case, merely re-affirmed the doctrine that the assignee in bankruptcy may recover the property ineffectually attempted to be transferred, setting forth just the remedy that appellant thinks should have been adopted in the case at bar. If Congress should have attempted to invest courts of bankruptcy with the power to take property by rule, or any other summary method, this is taking property or determining right without due process of law. Davidson's possession was legal and rightful. His sale was legal, usual and necessary. Bernheimer's possession was lawful, rightful and adverse. See Code of Alabama, 1896, § 4167, *et seq.*), and this possession could not be changed without due process of law.

I refer the court to the able opinion of Judge McCormick rendered in this cause reported in Vol. 93, Federal Reporter, p. 767.

See also 92 Fed. Rep. 594.
92 Fed. Rep. 325.

As to that portion of the judgment allowing Bernheimer counsel fees, etc. See Bankrupt Act, Sub-division "E." Section 3.

Thos. H. Clarke

Solicitor for L. Bernheimer.

No. 297. 58

Brief of Steiner for Respondent

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The facts of this case are accurately and succinctly stated in the statement preceding the opinion of the Circuit Court of Appeals. This statement is found on pages 19 to 26, inclusive, of the printed record.

In the first place, and to fix in the Court's mind a true idea of the great haste and summary character of the proceedings instituted in the District Court for the Middle District of Alabama, sitting in Bankruptcy, against Bernheimer, it will be seen that the adjudication

of Abraham as a Bankrupt was made and filed on Dec. 12, 1898, at 4:50 p. m. (See page 3 of Record.) Three minutes afterwards the petitioning creditors filed a petition asking the Bankrupt Court to make an order requiring L. J. Bryan, the marshal of the court, to take possession of the property purchased by Bernheimer of H. C. Davidson, the assignee of Abraham, the Bankrupt. Three minutes *before* this petition was filed the Judge of the District Court made an order on this petition, which was not then in Court, commanding the marshal, among other things, that "he demand, receive and take possession of all the property sold by said Davidson as assignee, to L. Bernheimer, or to any one else, and which may now be located in that certain storehouse on Dexter Avenue in the city of Montgomery, known as No. 106" (See page 6 of Record.) Great particularity seems to have been exacted as to the en-endorsements of the hour and minutes of the filing of these papers. Why this was done we do not know, but the endorsements disclose the fact that the Court made its first drastic order without having any petition, praying for such order, before it. Such was the initiation of these extraordinary proceedings. Just here, we ask the Court's attention to the prayer of the petition, found on pages 4 and 5 of the Record, and the language of the order made therein, on page 6 of the Record. The petition does not ask that the sale from Davidson to Bernheimer be set aside. There is a general averment,—nothing more—that the price paid by Bernheimer to Davidson was "greatly less than the appraisement made by said appraisers;" i. e., the appraisers appointed by the Register in Chancery of Montgomery county, Alabama, and, again, "at greatly less than its value." How much less, or for what price is not shown. Davidson, as assignee, being in posses-

sion of the money paid him by Bernheimer for *all* of the bankrupt effects—(for the petition avers that while it was Davidson's duty "to hold all the property and effects of Abraham, etc." he "proceeded to sell and dispose of said property and did dispose of the same", and his only sale was to Bernheimer)—the creditors asked in said petition that "Davidson be required to deliver to Bryan, as marshal, the books, accounts, papers, choses in action and any other property and effects in his possession" belonging to the bankrupt's estate, and also that Bryan, as marshal, take possession of all the property sold by Davidson, as assignee, to L. Bernheimer or to anyone else. The order of the Court, made before the petition was filed, closely followed the prayer of the petition and by it Bryan, the marshal, was ordered to "demand and receive from Davidson all books, accounts, papers and *other effects* of said Abraham which may be in the possession of said Davidson, as assignee," and the marshal was further ordered to take possession of all the property which Davidson, as assignee, had sold to Bernheimer

Assuming that the marshal did his duty and obeyed the order of the Bankrupt Court—and there is nothing in the record which shows he did not—he demanded and received from Davidson the $3,500.00 paid by Bernheimer to him for the goods. This was certainly a part of the bankrupt estate, and these very creditors, along with all others, were the beneficiaries under the general assignment made, as stated in the first petition filed, (see page 4 of Record)—"for the equal benefit of his creditors." So then, on the face of this proceeding, there was an attempt not only to seize the goods Bernheimer had bought and paid for, but also to bring into court the money he had paid for them! The record shows that Bryan, the marshal, seized the goods. The record

is silent as to whether he got the money or not from Davidson, and we are addressing ourselves to this record alone. At this point in the proceedings it seems to have occurred to the marshal, *ex mero motu*, so far as this record shows, that, as Bernheimer's goods had been sequestrated without any notice or other process of law directed to him, it might be at least decent and proper to *invite* him into court and see what *he* had to say to the summary manner in which he had been treated. The record does not show the marshal's petition in this behalf, but the Court's order of Dec. 13, 1898, (p. 7 of Record) recites that it was made on some petition of the marshal for "instructions," and it ordered that Bernheimer be notified to appear before the Court "in ten days from the date hereof and propound any claim he might have to the goods so seized, or to any part thereof, *or, failing therein, that he will be decreed to have no claim or right thereto!*" The italics and exclamation point are ours, of course. On the 17th day of December the petitioning creditors filed another petition, asking that Bernheimer be made to account, before the referee in bankruptcy, for the proceeds of the sales of any of the goods purchased by him from Davidson, before the seizure by the marshal. (Record, pp. 7 and 8). No order issued on this last petition, because Bernheimer came, upon the urgent invitation issued to him under the marshal's petition, and filed the two answers (Record, pp. 9, 12 and 13). In this connection the record discloses that some error was committed in the order in which the pleadings are stated. The two answers of Bernheimer to the rule should appear before the demurrer thereto, which appears on pages 11 and 12 of the record. But the dates of filing and refiling make this clear. The Court will always bear in mind that no rule had been issued to Bernheimer in the first instance

to show cause why he should not be ordered to *surrender* his goods. There was no sequestration to compel an answer, or issued in default of an answer. Unlike any proceeding known to an orderly administration of the law in any forum where the rights of the citizen are justly considered, the sequestration *preceded* the order to show cause or answer. Lugged into court in this summary way, Bernheimer filed his two answers to the twin petitions of the creditors, and showed cause, as best he could, in response to the court's demand. He had no choice in the matter. The Court had assumed jurisdiction to try his title, and to make that claim good, had seized his property. He was in no position to plead to the Court's jurisdiction. Little good could such a plea have served, for the Court had emphatically ordered him to come in and propound his claim, and, should he fail, had notified him that it would adjudge he had no title to the goods. Bernheimer's answer to the rule or mandate of the Court, found on pages 12 and 13 of the Record, in our opinion, and in the opinion of the Circuit Court of Appeals for the Fifth Circuit, demonstrates that the Bankrupt Court had no jurisdiction to seize the goods and try the title thereto by a rule such as this. Brought into court *in invitum*—his presence assured by a sequestration of his property preceding the invitation, our learned opponents argued in the Court below that Bernheimer invoked and acquiesced in the assumption of this jurisdiction by the District Court sitting in Bankruptcy!

The averment in Bernheimer's answer that a restraining order had, prior to the purchase by him of the goods in question, been asked for by the petitioning creditors to prevent Davidson from selling the goods, and that this restraining order had been refused by the District Court sitting in Bankruptcy, is an important

phase of this case, as we shall presently show. The judgment, or order, on Bernheimer's "claim" to the goods is found on page 14 of the Record. The Court solemnly adjudged, on the facts presented by the answers alone, and on the law as raised by the demurrer thereto, that Bernheimer had no title to the goods, and ordered him to account for and pay over to the marshal all the proceeds of the sale of such of the goods as he had disposed of before the seizure by the marshal. The demurrer is found on page 11 of the Record.

We have made the above statement of the facts of this case, with commentaries thereon, for the purpose of giving the Court a clearer idea of the proceedings than might be attained by the mere recapitulation thereof.

The points of law presented by the Record are as follows:

1. Did the District Court, sitting in Bankruptcy, have the jurisdiction to try the title to the goods in controversy by summarily seizing them and requiring Bernheimer, the purchaser from Davidson, assignee of Abraham, by a rule following the seizure, to appear before that Court in ten days and propound his claim, or, in default of such appearance, be decreed to have no title thereto?

2. Was the Circuit Court of Appeals justified in holding that this case is within the spirit of Section 3. e. or Section 69. a. of the Bankrupt Act, and that Bernheimer, on the restitution of the goods seized, should be allowed costs, expenses and counsel fees against the

creditors for wrongfully obtaining the seizure of the goods in controversy?

3. Was appeal the proper remedy by which Bernheimer could review the adverse decision of the Bankrupt Court?

We understand that counsel *contra.* do not press the latter point here. A sufficient reply thereto is found on pages 36, 37 and 38 of the Record, in the opinion of the Circuit Court of Appeals.

In regard to the first and main point in this case, and, also, as to the third, Judge Parlange, who dissented from the majority opinion in the Circuit Court of Appeals, fully concurred with the majority. His dissent was based alone on the allowance of counsel fees, costs and expenses to Bernheimer in the judgment reversing the District Court's order and rendering a decree for Bernheimer. By what authority of law did the petitioning creditors in this case apply for, and the District Court issue the special warrant for the seizure of the goods Bernheimer had purchased? The first section of the Bankrupt Act of 1898 contains a full statement of the powers and jurisdiction of the District Courts sitting as Courts of Bankruptcy. There is nothing in this section which would warrant the issuance of the extraordinary special warrant of seizure in this case. Even if we were to concede, which we do not by any means concede, that subdivision three (3) of that section furnished justification or excuse for the summary proceeding adopted, the petition filed and the case before the Court would not authorize such seizure. In the first place, the petitions and the sworn answers to the rule revealed that Bernheimer was an adverse claimant of the property seized. His possession was not the possession of

the bankrupt. Secondly, neither the petition, nor any other matter before the Court, showed it was "absolutely necessary for the preservation" of the bankrupt estate that such a writ should be issued. There is no averment of the insolvency of Bernheimer or that he could not respond to any judgment which might be obtained against him in a proper proceeding for the goods in his possession, or for their proceeds, should he have sold the same. In all cases, whether at law or in equity, the Courts require that before the property of a citizen, in his possession and to which he claims title, can be sequestrated, not only must good cause be shown in the application for sequestration, but bond must be made to indemnify him against loss, before he can be dispossessed. This, alone, is that "due process of law" which is enjoined by the Constitution of the United States before one can be deprived of the possession of his property.

Art. V., Constitution of the United States.

It cannot be questioned that the District Court of the United States, sitting as a Bankrupt Court, is a purely statutory tribunal. Courts created by statute can have no jurisdiction but such as the statute confers.

Sheldon v. Sill, 8 How, 441.

Furthermore, the present bankrupt act was passed in the knowledge of this Court's decisions on former statutes of the like character.

Smith v. Mason, 81 U. S. 419;
Lathrop v. Drake, 91 U. S. 516;
Eyster v. Gaff, Ib. 516;
Marshall v. Knox, 16 Wall. 351;
Massie v. Allen, 17 Wall. 351;
Claflin v. Houseman, 93 U. S. 130.

In addition to the principle announced in these decisions, the Bankrupt Act of 1898 is quite different from that of 1867 and the amendments thereto, in so far as the jurisdiction of the Bankrupt Courts are concerned, as applicable to controversies between the trustee in bankruptcy and adverse claimants to property alleged to belong to the bankrupt estate. By Sec. 23, subdivisions "a" and "b," of the Bankrupt Act of 1898, it is provided that the Federal Courts shall only have jurisdiction of suits for property claimed or acquired by trustees in bankruptcy in the same manner and to the same extent only, as though bankrupt proceedings had not been instituted and such controversies had been between the bankrupt and such adverse claimants, and that "suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have prosecuted them if proceedings in bankruptcy had not been instituted, etc."

We adopt, in this connection, as a part of our brief, the following language of the opinion of the Circuit Court of Appeals in this case: "If we concede or assume that the making of a deed of general assignment within four months of the adjudication in bankruptcy, which by the express terms of the law is an act of bankruptcy, wholly invalidates the deed so that no title can pass thereby as against the grantor's creditors, no matter what may be its terms or the avowed and apparent intent of the parties as shown by the deed (a concession which we are not now prepared to make, and do not make except for the purpose of the argument), the property and assets thereby attempted to be conveyed are precisely such assets and estate as it is made the duty of the trustee to recover and reclaim 'by legal proceedings or otherwise.' Whatever the words 'or otherwise' may embrace, it can hardly be seriously contended that they

embrace such summary proceedings in bankruptcy as the issuance of a special warrant to the marshal to seize the goods, and the service of a rule upon the claimant to come before the Court of Bankruptcy and render an account and make restitution for the value of any portion of such goods so attempted to be transferred to him which have been sold or otherwise disposed of by him. Such a construction would render more than nugatory surplusage the language 'by legal proceedings.' If, therefore, we were restricted in our view to the terms of Section 67e, it would clearly appear therefrom that 'by legal proceedings' must be intended controversies at law and in equity, as distinguished from proceedings in bankruptcy. But our view is not limited to the terms of Section 67 e.

"Conceding that the deed of assignment is invalid, and that no title passed to the assignee, or from him to the adverse claimant as against the grantor's creditors, then such title as the bankrupt had at the time of making the assignment vested fully in the trustee, and might, and doubtless often would be surrendered to him on demand. If such demand was refused, the act itself, as we have seen, provides for arbitration or compromise of the controversy. If these fail, and resort must be had to legal proceedings, the adverse claimant is entitled to his day in court, and in that court in which the bankrupt could have brought suit against him for the recovery of the property and assets. The fact that the bankrupt might be estopped and fail of securing a recovery, in no manner changes the aspect of the question as to the court in which a suit for such recovery could be brought by him. He would have a right to sue and to show, if he could, that title did not pass by the making and delivery of the deed. That is precisely what the trustee has to show, or, to state it more guard-

edly, the converse of that is precisely what the adverse claimant has the right to try to show, namely, that title did pass to him under the deed and by the subsequent action of the assignee.

"As already intimated, no question as to the validity or invalidity of the title of Bernheimer to the goods which he claims to have acquired from the assignee under the deed of assignment is now before us, but what we say in deciding the question of law is what we stated at the opening of this opinion to be the question: Did the district court, as a court of bankruptcy, have jurisdiction to try the title to the goods, and order a rule to account entered against the adverse claimant? It seems clear to us that under the act of 1867 the district courts, as courts of bankruptcy, were not invested with jurisdiction to proceed in that way in such cases as this, and that the whole tenor of the present law forbids the assumption and exercise of such jurisdiction."

The cases of Smith v. Mason, and Marshall v. Knox and Massie v. Allen, *supra*, amply sustain the proposition that the bankrupt court had no jurisdiction to seize the property purchased by Bernheimer and to undertake to try his title thereto in the summary manner adopted in this case.

Even if it had such jurisdiction, was the case before that court one which showed that Bernheimer had no title to the goods purchased? It can not be questioned that at its inception Davidson's title under the general assignment was a valid one. It occurs to us as a monstrosity in law to hold that a title valid in its inception can ever be more than voidable by act *ex post facto* its creation. Under the statutes of Alabama, Davidson's possession was legal and rightful. His sale

was legal, usual and necessary. Bernheimer's possession was lawful, rightful and adverse to the world. The statutes of Alabama, in regard to assignments for the benefit of creditors, are found in the Code of Alabama, of 1886, from section 4152 to 4173 inclusive, which comprise Article I of Chapter 113 of said Code. We will not quote them in full, for it will not be contended that these sections do not recognize and validate such assignments as that made by Abraham to Davidson, and that they authorized, if not required, Davidson to proceed to administer the estate entrusted to him, for the equal benefit of all the creditors of Abraham in the State Court, in which he did attempt to administer it. If Davidson and Bernheimer's title was voidable merely, it must have been voided in some legal proceeding—by some due process of law. Attention is called to the fact that the petition for the special warrant of seizure in this case does not seek to avoid that title. It does not even make Bernheimer or Davidson a party to the proceedings, but merely asks for a writ of seizure. In no way or place do the petitioners recognize Bernheimer's rights to assert title to his goods, in any forum. It remained for the marshal, on his own motion and after the goods were seized, to suggest, as an officer of the court, not as any representative of the petitioning creditors, that Bernheimer be brought in. Can it be seriously contended, in view of Article V of the Constitution of the United States, and in view of the decisions above cited, which show that this court has "steadily set its face" against proceedings such as were initiated against Bernheimer, that such proceedings should receive the sanction of a free court in a free country? The process smacks of the ancient system of law once prevailing on the Scotch Border and known as "Jedwood Justice." To save

time, it was allowable, if not enjoined, under that system, to hang a man first and try him afterwards. Here the idea was to seize a man's goods and try his right to the possession afterwards. But, even worse than the Jedwood practice, these petitioners did not even suggest or ask that Bernheimer's title should be tried at all!

We are aware that there was, under the bankrupt act of 1867 and the amendments thereto, much difference of opinion as to whether a general assignment was void or obnoxious to the provisions of that law. Some cases went so far as to hold that an assignment for the equal benefit of all the assignor's creditors constituted a "preference." This seems to have been the decision in Globe Ins. Co. v. Cleveland Ins. Co., 14 N. B. R. 311. We do not understand the reasoning of that case. The conclusion seems an absurdity on its face. It is true that under the bankrupt act of 1867, only an assignment or other conveyance, made with the intent to hinder, delay and defraud creditors, was an act of bankruptcy, while under the act of 1898 the mere making of a general assignment for the benefit of creditors is an act of bankruptcy. But, fairly considered in the light of the authorities, there is but little difference, materially, in the results.

The case of Boese as Receiver v. King et als. assignees, etc., 108 U. S., sheds some light on the question.

The Alabama statutes referred to in a former part of this brief, which provide for the filing of an appraisement of property assigned to a person for the benefit of creditors with the Register in Chancery of the County in which the property is located, were not suspended by the bankrupt act, because they are in no ways in conflict therewith. We append to this brief the sections

of the Alabama Code bearing on such assignments. These statutes are in no true sense insolvent laws. No provision is made therein for the discharge of the debtor, nor do they, in any way, affect any contract of indebtedness. Even the insolvent laws of a state are not suspended by a National Bankrupt Act, except in so far as they may conflict with the acts of Congress.

Appeal of Geery, 43 Conn. 289;
Pugh v. Brassell, 22 Blatch. 440.

The operation of Federal bankrupt laws on identically such statutes as those contained in the Alabama Code, was considered in the case of Peck v. Parker, 65 Penn. St. 262. It was held in that case that "a voluntary assignment by a debtor in failing circumstances to a trustee, for the equal benefit of all of his creditors, does not depend, for its validity, on any statute, and the acts of a State Legislature, passed to regulate such assignments, which require the assignment to be recorded, compel the assignee to file an inventory and appraisement, and to give security, and provide for the settlement of the assignee's accounts and the distribution of the assets are not insolvent laws, and,hence, are unaffected by the enactment by Congress of a uniform law on the subject of bankruptcy."

But it has been expressly decided by this court that a general assignment for the benefit of creditors is not void as against the bankrupt laws, but, at most, voidable only. It is true that the decision alluded to was rendered under the bankrupt law of 1867, but, as shown from the authorities cited above, and many more might be cited to the same effect—there is no material difference between the statute now in force, so far as the construction in this respect is concerned and the construc-

tion pl[illegible]d on the old act. We allude to the case of Mayer & Evans vs. Hellman, 91 U. S. 495. Justice Field, rendering the opinion of the Court, says:

"The counsel for plaintiff in error has filed an elaborate argument to show that assignments for the benefit of creditors generally are not opposed to the bankrupt act, though made within six months previous to the filing of the petition. Their argument is, that such an assignment is only a voluntary execution of what the bankrupt court would compel, and as it is not a proceeding in itself fraudulent as against creditors and does not give a preference to one creditor over another, it conflicts with no positive inhibition of the statute. There is much force in the position of counsel and it has the support of a decision of the late Mr. Justice Nelson, in the Circuit Court of New York, in Sedgwick v. Place, 1 Nat. Bank Reg. 204, and of Mr. Justice Swayne in the Circuit Court of Ohio, in Longley v. Perry, 2 Nat. Bank Reg. 180. *Certain it is* that such an assignment is not absolutely void, and, if voidable, it must be because it may be deemed, perhaps, necessary to the efficiency of the bankrupt act, that the administration of an insolvent's estate must be entrusted to the direction of the District Court, and not left under the control of the appointee of the insolvent."

This case also holds that the Ohio statute discussed which is in its terms similar to the sections of the Alabama Code cited, was not an "insolvent law" and was not in conflict with the bankrupt act.

It is true that the making of a general assignment for the benefit of creditors within four months before the filing of a petition for involuntary bankruptcy, is made an act of bankruptcy by the act of 1898, Sec. 3.a. But

the act expressly specifies what conveyances, transfers and assignments are *void* under this act. They are enumerated under Section 67.e. of the act, and the sentence of *nullity* is passed *alone* on these particular acts. These acts are as follows: "All conveyances, transfers, assignments or incumbrances of his property or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act, subsequent to the passage of this act and within four months prior to the filing of the petition *with the intent and purpose on his part to hinder, delay or defraud his creditors. or any of them*, shall be null and void as against the creditors of such debtor." We cannot believe that a Court will impute a covinous intent to a man who makes a conveyance of all his property for the equal benefit of all his creditors.

Mays v. Hellman, 91 U. S., *supra*;
Reed v. McIntyre, 98 U. S. 510.

The case last cited is pertinent, in that it takes for granted that the question of title between the assignee or trustee in bankruptcy must be litigated in the usual proceedings at law or in equity between claimants to property. The opinion of the Circuit Court of Appeals on this point is found on pages 34 and 35 of the record, and has been already quoted in this brief.

It will be noted that even as to property conveyed by an assignment it is void, only because its purpose is to hinder, delay or defraud creditors. Section 67.e. of the bankrupt act provides that such property must be recovered by legal "proceedings." These words have a clear legal significance, the words added—"or otherwise," were well applied to the arbitration or compromioe mentioned in sections 26.a. and 27.a. of the act. Surely *any* construction is preferable to one which seeks

to vest a despotic and irresponsible power in a litigant to use the processes of a Federal Court to seize, without trial, the property held by an adverse claimant. See further;

Re. Romanow, 91 Fed. rep. 510;
Re. Seevers, 91 Fed. Rep. 366.

Even the extreme cases of Re. Smith, 92 Fed. Rep. 135, and Re. Gutwilling, 90 Fed. Rep. 475, do not go to the extreme of holding that a seizure of goods, even in the hands of an assignee for the benefit of creditors, much less of a person who has purchased in good faith from him, can be had without first an opportunity to him in court of showing cause why he should not be commanded to deliver the assigneed goods to the trustee. The court will observe that the writ of seizure and the seizure under it was had in this court *before* any trustee in bankruptcy was appointed. No receiver was appointed and none asked for. Section 67.e. vests the right to "recover and reclaim" property conveyed by the bankrupt in fraud of the law by "legal proceedings or otherwise" in the trustee. Conceeding that these legal proceedings or otherwise may include the right to ask for and obtain such an extraordinary writ as that under which the goods in controversey were seized in this case, the application therefor by the trustee was a prerequisite jurisdictional fact. But it will be contended that this summary order was issued under the provisions of subdivision 3 of Section 2 of the act. It is true that this part of the act gives the court power upon the application of parties in interest "*in case the courts shall find it absolutely necessary for the preservation of the estates*, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is appointed." In the first place, it is not alleged in the creditors' petition for the extraordinary writ, *nor was it*

found by the court that it was *absolutely necessary* for the preservation of this estate that this property should be seized as it was seized. The bankrupt court is a purely statutory court, the finding of this jurisdictional fact of "*absolute necessity*" (it would be hard to select stronger words), is made essential to the exercise of jurisdiction and no intendments will be indulged in favor of jurisdiction of purely statutory courts.

"In summary proceedings, where a court exercises extraordinary power under a special statute which prescribes its course, that course must be strictly pursued, *and the facts which give jurisdiction ought to appear on the face of the record, otherwise the proceedings are acsolutely void.*"

Thatcher v Powell, 6 Wheat. 119;
Ferguson v Jones, 17 Or. 204.

All the courts of the United States, except the Supreme Court, are statutory courts.

United States v Hudson, 7 Cranch. 32.

In the case of Ferguson v Jones, 17 Or. *supra.* it is said by the court that "where a court of general jurisdiction has summary powers conferred upon it, which are wholly derived from statute and not exercised according to the course of the common law, or are not part of its general jurisdiction, its decisions must be regarded and treated like those of courts of limited and special jurisdiction." See also;

1 Black on Judgments, Sec. 279 and authorities cited in note;
Bush v Hanson, 70 Ill, 480.

It cannot be questioned that this proceeding, if au-

thorized by law at all, was strictly summary in its nature. It is equally beyond doubt that not only the pleadings but the judgment in a summary proceeding must show all the requisite jurisdictional facts, and that the judgment must show a finding of these facts.

Graham v. Reynolds, 45 Ala. 578;
Hayes v. Gates, 2 Head.
Crockett v. Parkinson, 3 Coldw. 219.
Smith v Branch Bank of Mobile, 5 Ala. 25;
Andrews v Branch Bank of Mobile, 10 Ala. 375;
Barclay v Barclay, 42 Ala. 345;
Babyshall vs Oppenheimer, 4 Wash. C. C. 482.
Chandler vs Nash, 5 Mich, 409.
Clark vs Norton, 6 Minn, 412.
Pennine vs Farr 22 N. J. Law, 355.
People vs Matton, 39, How. Prac. 454.
Conley v Conley, 29 Ala. 373.
Cowdery v Town of Concades, 15 Fed. Rep. 532.
Eaton vs St. Charles county, 65 Mo. 585.

The principles expressed in these cases is that in such proceedings, even where the defendant appears, every other fact except that of notice to him must be proved and *appear in the judgment entry.* See also:

1 Black on Judgments, Sec. 280.

It appears to us that the seizure contemplated in sub-division 3 of Section 2 of the Bankrupt Act is nothing more than the one alluded to in Section 3. e. of that Act. Section 2 is most general in its phraseology, and provides the only kinds of seizures of this character mentioned in that portion of the Act preceding Section 3.e. The phraseology of Section 3.e. is as follows: "Whenever a petition is filed by any person

for the purpose of having another adjudged a bankrupt, and an application is made to take charge of and hold the property of the alleged bankrupt, or any part of the same, prior to the adjudication and pending a hearing on the petition, the petitioner or applicant shall file in the same court a bond," etc. The filing of this bond for the protection of the party from whose possession the property is to be taken, is, of course, a condition precedent to any seizure. In the Circuit Court of Appeals the Justice rendering the judgment seemed to take it for granted that the proceedings for and the issuance of the writ were taken *after* Abraham was adjudged a bankrupt, and that hence the matter did not fall "within the letter of sections 3.e. or 69.a." etc. This is only partly true. The record discloses that the writ of seizure issued at 4:50 p. m. of the 12th day of December, 1898 (Record p. 6). The adjudication of bankruptcy was rendered at *precisely the same time*, viz: "Dec. 12, 1898, at 4:50 p. m." (Record, p. 3.) Which preceded the other? Can the Court say, from the record, that the adjudication preceded the writ, and that the writ did not issue prior to the adjudication? Great particularity was shown in the filing, as to minutes, etc. Rule 2 of General Order in Bankruptcy requires this particularity and gives its significance. Nothing can be plainer than the proposition that, if the writ *issued prior* to the adjudication, the making of the bond required by Section 3.e. was an absolute prerequisite to its issuance. Nothing can be clearer than the proposition that the adjudication and the issuance of the writ could not have been simultaneous—unless the Judge was so cleverly ambi-dextrous that he could sign his name to two papers at the same time! Surely the Act of Congress has not provided for such a case as this, nor has Providence been so generous, as a

rule, to the Federal judiciary. It does not help the matter to argue that the law does not take cognizance of parts of days. Indeed, this rule is never allowed, in modern times, to contradict facts. Even were it applied, we would find the writ without authority in the Act. Congress, conceding the argument *contra*, only provided for the issuance of two kinds of summary writs: one prior to adjudication in bankruptcy—Section 3.e., and one subsequent, Section 2, subdivision 3. Section 3.e. could have no scope at all unless it included *all* cases of summary seizure before adjudication. Here, we have a case that falls within the scope of neither section, viz: the issuance of a writ of seizure *simultaneous* with the adjudication. The facts are obvious that all the papers, adjudication, petition for writ and writ itself were issued at one and the same time, and as fast as the Judge could sign them. If this is not so, then the marshal, representing the creditors here, is met with another insuperable objection which invalidates the whole proceeding—the writ issued *before any application* was filed in court. Indeed, the record shows that, while the adjudication and writ were made and issued at 4:50 p. m., December 12, the petition for it was not in court until 4:53 p. m.! Injunctions and other writs of like character cannot issue until the application or petition therefor are filed in court. Writs issued before filing of bill or complaint are *coram non judice*.

Harwell v. Potts, 80 Ala., 70.

But, we insist, as above stated, that the act only contemplated the issuance of a writ of seizure, as provided for in Section 3 e. From the phraseology of Section 2, subdivision 3, the *general* jurisdiction of the court is to issue such writs at any time after the filing of the peti-

tion, whether for voluntary or involuntary bankruptcy. This is the only character of said writs mentioned before section 3 e., and this latter section limits the method of procedure, viz: by applicant giving bond, etc. We do not see why a bond should be required in the case of such proceeding before, and one not required after, adjudication; especially where, as here, the property is shown in the application itself to be not in the hands of the bankrupt, but a purchaser from the assignee.

Considerable light is shed upon the question involved here by the provisions of Section 69 a. of the Act. The provisions of Sections 3 e. and 69 a. are nearly the same. But it can hardly be held that Congress did not intend some different application. If the words in Section 2, subdivision 3, are given their proper signification, i. e., as conferring in a general way jurisdiction to sequestrate the property of a person adjudged a bankrupt or against whom proceedings in bankruptcy have been instituted, then Section 3 e. and Section 69 a. following first, define the method of procedure to be taken in carrying out the jurisdiction conferred, and are the only portions of the act which do so define the process required. Section 3 e. expressly provides how application shall be made "*prior to adjudication*" for a seizure of the bankrupt's property. Bond is required, with sureties, to indemnify the "*respondent*" for all costs, expenses and damages "occasioned by the seizure should the petition be dismissed." We have italicized the word "respondent" to accentuate the comparison we will make between the provisions of this section and those of 69 a. The latter reads as follows: "A judge may, upon satisfactory proof, by affidavit, that a '*bankrupt*' against whom an involuntary petition has been filed (the case here) and is pending, has committed an act of bankruptcy, or has neglected or is neglecting or is about to neglect his

property, that is thereby deteriorating or is about to deteriorate in value, issue a warrant to the marshal to seize and hold it subject to further orders. *Before such warrant is issued* the petitioners applying therefor shall enter into a bond in such amount as the judge shall fix, with such sureties as he shall approve, conditioned to indemnify such *bankrupt* for such damages as he shall sustain in event such seizure shall prove to have been wrongfully obtained," etc. The act is certainly obscure in these two sections. But Section 3 e. obviously refers to a mere "respondent" to a proceeding in bankruptcy. Section 69 a. clearly includes one who has been adjudicated a "bankrupt," for one is not a bankrupt until adjudication. The facts in this case also show that these petitioners endeavored to get a restraining order against Davidson, the assignee, to prevent his selling the property, but, declining to give bond, the judge refused to restrain Davidson; in this instance only, showing some consideration for persons other than the creditors.

The application for a writ of seizure was made under either section 3 e. or under section 69 a. Under either, the writ was wrongfully and illegally issued, for no bond was required or given for the issuance. The facts demonstrate to our mind that there is nothing in the record which shows that the writ was issued subsequent to the adjudication. The court's attention is especially directed to the petition for this writ filed by the creditors. (See page 4 of Record.) Nowhere in it is it averred that, at the time of the filing thereof, Abraham *had been adjudged* a bankrupt. Indeed, it was a physical impossibility that he had been so adjudged at that time. The petition shows on its face that it was filed under Section 3 e. or 69 a. The judgment of the court ordering the issuance of the writ fails to show that the ad-

judication had been made (See page 6 of the Record) and the adjudication (page 3 of the Record) shows that it had not been made when the writ issued.

So, even if the court should hold for naught the fact of Bernheimer's purchase, his adverse claim and that he bought after the District Court had refused to enjoin Davidson from selling, and hence had allowed him to hold himself out to the world as authorized to sell, and this because the creditors declined to give any bond; even if the statutory rule laid down in Smith v. Mason, Marshal v. Knox and Massey v. Allen, *supra*, is to be overturned, yet sentence of nullity must be pronounced against this extraordinary and unauthorized proceeding of the District Court of the Middle District of Alabama, sitting as a court of Bankruptcy.

A case fully approving the opinion rendered in this cause by the Circuit Court of Appeals for the Fifth Circuit was lately decided in North Carolina.

Loan & Trust Co. v. Benbow, Vol. 3, Bo. 1, Am. Bnkr. Rep., p. 9.

The proceedings in bankruptcy are equivalent to a general creditor's bill in equity. So far as not varied by law the practice should be the same. The collateral proceedings are the same, as like collateral proceedings in such bills in chancery, and are summary *only* when they would be so in a creditor's bill.

Black, on Bankruptcy, p. 8, and authorities cited.

2. The second question involved is: Was the Circuit Court of Appeals justified, from the facts disclosed in this record, in holding that the petitioning creditors

were liable, under sections 3 e. and 69 a. of the Bankrupt Act, for the costs, expenses and counsel fees incurred by Bernheimer by reason of the unlawful seizure of his property?

As we have said, we differ from the Circuit Court of Appeals as to the statement in its opinion that the action of the creditors of Abraham in suing out this writ was not within the letter of Sections 3 e. and 69 a. As we have shown, it was a physical impossibility that the writ of seizure could have been issued after the adjudication of Abraham as a bankrupt. We think we have shown, also, that the provisions of Section 69 a. apply to cases where writs of seizure issue at any time pending proceedings in bankruptcy. If we are correct, then either of said sections "denounce against them (the creditors) the penalty prescribed for wrongfully obtaining thereunder the seizure of the property of the alleged bankrupt." If the "application for the writ to seize and the seizure thereunder of the goods in controversy was a flagrant violation" of the provisions of Sections 3.e. and 69.a. of the Bankrupt Act, in letter *or* in spirit, was the Bankrupt Court powerless to give relief to the person wronged?

Subdivision 15 of Section 2 of the Bankrupt Act empowers the District Courts to "make such orders, issue such process and enter such judgments in addition to those specifically provided for, as may be necessary for the enforcement of this Act.

In the dissenting opinion of Judge Parlange, in this case, in the Circuit Court of Appeals, he bases his dissent on the allowance to Bernheimer of costs, counsel fees, etc., *alone*, and says, in this connection, that as the District Court had no jurisdiction to issue this writ and

try the title to the goods in controversy by such summary process, that it could not award costs or order execution for them to issue. This might be so if the Court had no jurisdiction over the parties to the bankrupt proceeding. But it undoubtedly *had* such jurisdiction over the petitioning creditors of Abraham. They had invoked, in the first instance, the Court's jurisdiction by the petition for involuntary bankruptcy against Abraham. They were in court, and subject to its orders and process, and would be so subject until, at least, the discharge of the bankrupt. Probably until the final winding up of the bankrupt's estate. In most respects, the proceedings in a Bankrupt Court are for the same purpose and governed by the same principles which control Courts of Equity in dealing with a trust estate committed to its charge, or in cases of a general creditors' bill in Chancery. So far as not varied by the statute, the practice should be the same.

Black on Bankruptcy, p. 8.
Re. Anderson, 23 Fed. Rep. 482.

It can surely be within its powers to prevent an abuse of its process and render such orders or enter such decrees as will punish such abuse, and, further, to put in *statu quo* any one injured by such abuse. The duty is specifically enjoined on it to "enter such judgments *** as may be necessary to enforce the provisions of this act."

Section 2, subdivision 15, above cited.

One of the express provisions of the Act is that the estate of the bankrupt cannot be seized without provision for his indemnity by giving bond before seizure.

Secs. 3.e. and 69.a.

The phraseology of the last paragraph of Section 2 is significant in this connection. "Nothing in this section contained shall be construed to deprive a Court of Bankruptcy of any power it would possess, were certain specific powers not herein enumerated." The jurisdiction of the Bankrupt Court, being plenary, so far as the petitioning creditors are concerned, they having come into it voluntarily and Bernheimer having been forced in by a wrongful writ and seizure and his property put in *custodia legis*, why should not he be allowed complete relief without resorting to some other forum? The wrong was done him in the District Court—why should not that Court right the wrong? It is axiomatic that a Court of Equity, having jurisdiction of the parties—plenary jurisdiction so far as these petitioning creditors are concerned—and of the subject matter, will make its jurisdiction effectual for complete relief.

Ober v. Gallagher, 93 U. S., 199.

Suppose a receiver, appointed under a general creditor's bill, in equity, instigated by complainants, should seize the property of an outsider and put him to great costs and expense? Would not the court, in ordering a restoration of the property, adjudge that those who procured the doing of the unlawful act by abuse of its process be compelled, not only to make restoration of the property seized, but compensation for the wrong they had done the person injured by the seizure? And, if the court would do so on application, should it not, when its eyes are opened by its own reflection or its sense of justice quickened by an appellate tribunal, do this same right without an application and in the same suit in which the wrong was perpetrated?—the Abraham bankrupt proceeding here.

Something was said by Judge Parlange, in his dissenting opinion, about no demand being made by Bernheimer for counsel fees, damages and costs incurred by him by reason of this summary proceeding, and that, hence, the same should not be allowed him. A casual inspection of this record will show that Bernheimer was in no position, in the District Court, to ask for anything. The very limit given him by the court's rule to show cause, issued at the marshal's instance and after his goods were seized, was to come in and propound his claim to the goods, and this *alone*. A chalk mark was drawn for him to go by; he was to walk a tight rope stretched by the court, and was evidently treated as an enemy and not a suitor in that temple of justice. His deprecating answer, in response to the court's stern mandate, shows his state of mind and estate at this critical juncture in his commercial career. If the court will pardon a little levity by way of illustration, he was like the minister after sending around his hat for contributions among a sordid congregation; if he got anything back he might exclaim with that preacher, "I thank God that I have got my hat back from this congregation!" But his modesty in the face of great peril should not now estop him from claiming what is of right his, or in receiving the reimbursement to which he was entitled from the law's sense of justice.

We refer to the learned opinion of the Circuit Court of Appeals, page 39 of Record, for further argument on this question.

3. We can add nothing to the argument of Judge McCormick in this case on the motion to dismiss the appeal. This argument is found on pages 35 to 38 inclusive, of the Record. Again, we are informed by counsel *contra* that it will not be insisted that the Cir-

cuit Court of Appeals erred in refusing to grant the motion to dismiss the appeal.

The late case of Re. Sarah Cohn, Am. Bankruptcy Reports, Vol. 3, No. 3, for March, 1900, contains an emphatic declaration in the opinion by Judge Brown of the District Court for the Southern District of New York, against such summary proceeding as the one assailed here.

We attach to this brief a copy of the sections of the Alabama Code, bearing on assignments for the benefit of creditors.

Respectfully submitted,
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SECTIONS 4156 AND 4157 OF THE CODE OF ALABAMA, OF 1896.

As to Assignments for Benefit of Creditors.

4156. TRUSTEES TO MAKE INVENTORY OF TRUST PROPERTY AND FILE TWO COPIES WITH THE REGISTER. It is the duty of the trustee of an express trust created for the payment of debts, within ten days after entering upon the execution of such trust, to make an inventory of the entire trust property so far as the same has come to his possession or knowledge, describing the real estate and grouping or classifying the personal property in as brief and comprehensive manner as may be con-

sistent with its proper identification and appraisement, and stating the amount and character of all choses in action, with the names of debtors, belonging to the trust. In reducing such inventory to writing, the trustee must leave appropriate spaces opposite each article or item, with proper caption, in which spaces the appraised value may be inserted by the appraisers. The trustee must, within the time above stipulated, file, in the office of the Register in Chancery of the district in which the most valuable portion of the trust property may be, two copies of such inventory, each of which shall be duly verified by his affidavit; and if there be property in more than one county, a separate inventory of the property in each county must be made and filed. Supplemental inventories may be made in like manner.

4157. APPOINTMENT AND DUTY OF APPRAISERS.—On the filing of such inventory the register must indorse upon each of such copies the fact and date of such filing and must appoint three competent and disinterested persons, who must not be of kin or of counsel to any person interested in the trust estate, appraisers of and in each county in which any part of the trust property may be, and must attach to the commission one of the copies of such inventory filed by the trustee; and the appraisers must, in writing, appraise at its true value, the property described in such inventory and set down in figures opposite each article or item, the appraised value thereof, add each column and carry forward the result so as to show the aggregate or total valuation placed upon such property, and verify the same by affidavit and make return thereof to the register who must record the commission to the appraisers and such combined inventory and appraisement, together with the affidavits appended thereto. The other copy of the inventory filed by the trustee must be carefully pre-

served by the register, free to the examination of all persons, but must not be recorded. The appraisers are severally entitled to two dollars for each day's service in making such appraisement, to be taxed as costs and collected and paid over by the register.